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No. **509**

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA
(OCTOBER TERM A. D. 1947)

HARRY R. RANDALL, *Petitioner*

vs.

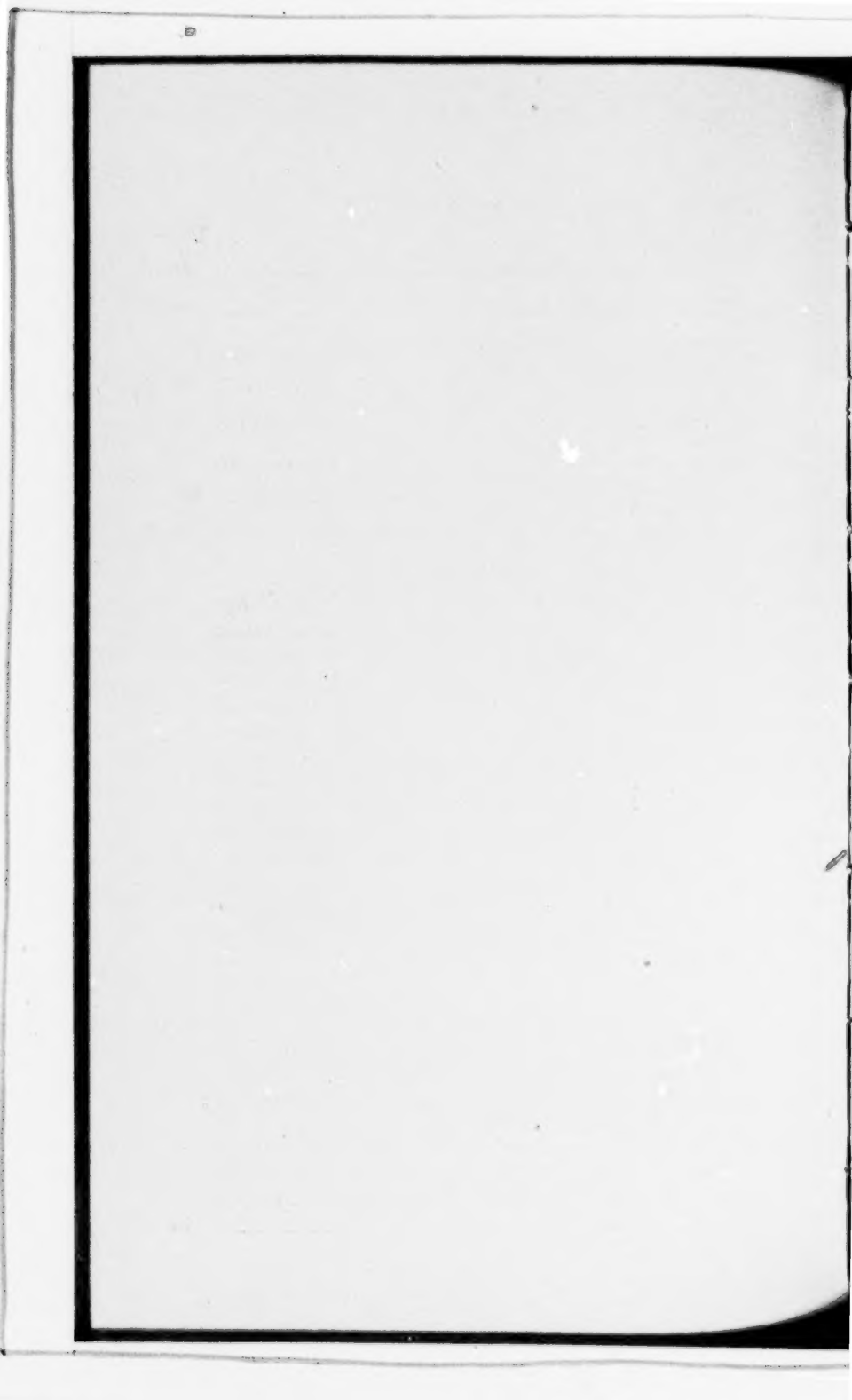
UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO
THE CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARVIN B. SIMPSON, SR.
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Fort Worth, Texas

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<p>(1) The holding of the Seventh Circuit Court of Appeals in this case to the effect: That an appellate court in examining the record must take that view of the evidence most favorable to the plaintiff, and must give to the plaintiff the benefit of all inferences which reasonably may be drawn from the evidence. In such appeals the question is not whether the evidence is sufficient to prove defendant's guilt beyond a reasonable doubt, but rather whether the verdict is supported by any substantial evidence direct or circumstantial. Such holding is in direct conflict with the holding of the 9th Circuit Court of Appeals in the case of Karns vs. U. S. 158 F (2) 568, to the effect: The evidence should be required to point so surely and unerringly to the guilt of the defendant as to exclude every reasonable hypothesis but that of guilt.....</p>	
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<p>(2) In sustaining the trial's court refusal to instruct a verdict for the defendant, and in affirming the judgment of the trial court the appellate court has so far departed from the accepted and usual course of judicial procedure and sanctioned such a departure by a trial court as to call for exercise of the court's power of supervision.....</p>	
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No. _____

IN THE

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OF AMERICA**

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UNITED STATES OF AMERICA, *Respondent*

**PETITION FOR WRIT OF CERTIORARI TO
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FOR THE SEVENTH CIRCUIT**

Reported below F. (2d)

**TO THE HONORABLE CHIEF JUSTICE, and THE
HONORABLE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:**

**A. SUMMARY STATEMENT OF
MATTERS INVOLVED**

The indictment and subsequent proceedings

The petitioner was indicted in the Southern District of Indiana (filed September 20, 1946), such indictment charging that petitioner conspired with one Sterling J. Perry, an officer of the National City Bank of Evansville, Indiana, a member bank and an insured bank as defined by Sections 221-225 and Sec. 264 of

Title 12, United States Code, and other persons unknown to the Grand Jury for the said Perry to embezzle, abstract and wilfully misapply the funds and credits of said bank with the intent on the part of the petitioner to injure and defraud said bank, and to deceive the officers of said bank, the Comptroller of the currency, the Federal Deposit Insurance Corporation and all the agents and examiners of said bank; the indictment alleges that such conspiracy began on or about the first day of January, 1940, and to; and was in existence until, May 27, 1947, and it alleges that to effect the object of said conspiracy the petitioner (and others) committed 34 overt acts; a second count charges that petitioner aided and abetted Sterling J. Perry in committing offenses against said bank, but incorporated such offenses by reference to another indictment returned against Perry. (R. page 1 to 12 inc.)

The trial court dismissed the second count of the indictment on motion of the petitioner (R. 27) and the trial on the merits was had on the first count beginning December 9, 1947, and testimony concluded on December 12, 1947 (R. 31 to 310). A motion for an instructed verdict was made at the close of the Government's evidence (R. 191) and renewed at the close of the defendant's evidence (R. 310). The court refused both such motions and the defendant excepted. (R. 310.)

The District Court submitted the case to a jury and a verdict of guilt was returned and the defendant filed a motion for a new trial which was overruled by the Court (R. 331). The defendant was sentenced to two

years imprisonment and a fine of Five Thousand Dollars (R. 333).

The Circuit Court of Appeals based its affirmance of the case on the theory that there was substantial evidence, direct or circumstantial, to support the verdict of the jury.

The District Court filed no written opinion. The Circuit Court of Appeals, in affirming, wrote an opinion dated November 3, 1947. Opinion by Justice KERNER, and District Judge LINDLEY, Chief Justice SPARKS dissenting without written opinion.

A Motion for Rehearing was overruled on December 8, 1947. (R.)

JURISDICTION

The jurisdiction of this court is invoked under Judicial Code, Sec. 256, as amended (28 U. S. C. A. 37a). The judgment of the Circuit Court of Appeals was entered November 3, 1947 (R.). Rehearing was denied December 8, 1947 (R.).

QUESTIONS PRESENTED

I. The evidence fails to support the verdict and judgment entered thereon, because the evidence as a whole is insufficient to support the verdict of the jury and the judgment of the court.

II. The evidence fails to support the verdict and judgment because the evidence is insufficient to show that the defendant, Randall, had any knowledge of, or participated in, any conspiracy with Perry, or any

other person or persons, or had any agreement with said Perry or any other person, express or implied, to violate any law as charged in the indictment.

III. The substantial evidence adduced on the trial does not exclude every other reasonable hypothesis except the guilt of defendant Randall; it was therefore the duty of the Trial Court to instruct the jury to return a verdict of not guilty and in failing so to do, it was the duty of the Appellate Court to reverse a judgment of conviction.

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred in affirming the judgment of conviction of the petitioner, and in failing to reverse the judgment and order a new trial.

The Circuit Court of Appeals erred in applying the law to the facts in this case in holding that the question involved in the appeal was whether there was substantial evidence to support the judgment, direct or circumstantial, because the law as applied to this case is that the evidence should be such as to exclude every other reasonable hypothesis except that of the guilt of the defendant.

LAWS INVOLVED

Section 88, Title 18, U. S. C. A. (Section 37 of the Criminal Code) being the conspiracy statute, and sections 221-225 and section 264, Title 12, U. S. C. A.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The holding of the Circuit Court of Appeals for the Seventh Circuit in this case to the effect: *"That an appellate court in examining the record must take that view of the evidence most favorable to the plaintiff and must give to the plaintiff the benefit of all inferences which reasonably may be drawn from the evidence. In such appeals the question is not whether the evidence is sufficient to prove defendant's guilt beyond a reasonable doubt, but rather whether the verdict is supported by any substantial evidence, direct or circumstantial. Such holding is in direct conflict with the holding of the Ninth (9th) Circuit Court of Appeals in the case of Karns vs. U. S., 158 F. (2d) 568, to the effect: The evidence should be required to point so surely and unerringly to the guilt of the defendant as to exclude every reasonable hypothesis but that of guilt."*

The testimony in this case adduced to establish the alleged conspiracy was wholly circumstantial, and so recognized by the trial court in its charge to the jury (R. 321) and they are not inconsistent with the defendant's protested innocence, indeed they amount to nothing more than suspicion.

This court is sensible to the necessity of apprehending criminals, and of the advantage to society of having criminals suffer for their offenses; but it is equally sensible to the upholding of sound and tried principles of law, which protect the innocent and safeguard individual rights and liberties, the restriction of which

brought this nation into being. When men are convicted and every right the genius of their country gives them have been exhausted—they can submit, when however, substantial rights are denied and that denial sanctioned by the courts, they can but despair; in the first instance we find vindication of democracy, but in the latter case, there no longer exists a reason for the courts, for justice is no more.

Coming to the facts in this case we find that Perry, an officer of the National City Bank, and one of the officers whose duty and privilege it was to loan money of the bank to its customers. The defendant, being a customer of the bank, needed financial assistance and appealed to Perry. Relief was granted and there developed a custom between Perry and the petitioner Randall, unorthodox perhaps, but certainly not unusual, the practice of the defendant writing what is called in the record "no-fund" checks which were honored by the bank, and which defendant treated as a loan. It so happened that the officer of the bank was defaulting and abstracting the funds of the bank, not only the funds which were paid out on the "no fund" checks, but also other funds to other people.

Does the fact that the defendant was the recipient of abstracted funds, although abstracted with his knowledge or consent, make him a party to the wilful abstract of such funds? We think not. In the instant case the record shows no knowledge on the part of Randall.

In *Dickerson vs. U. S.*, 18 F. (2d) 887, the court aptly expresses our view of the law of the instant case,

which we think was here misapplied by the Circuit Court of Appeals. The court there said "*We think the most that can be said of this testimony is that it creates some suspicion, or gives rise to an inference, that the plaintiffs in error might have some knowledge of the conspiracy at the time they purchased the liquor from one or another of the conspirators.*" And again in the case of *McLaughlin vs. United States*, 25 F. (2d) 1, in discussing a conspiracy the court said: "*Unless there is substantial evidence of facts which exclude every other reasonable hypothesis than the guilt of the accused it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.*"

2. In sustaining the trial's court refusal to instruct a verdict for the defendant, and in affirming the judgment of the trial court the appellate court has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court as to call for an exercise of the court's power of supervision.

The burden of proof in all criminal cases rests on the prosecution. If the Government failed the quantum of proof necessary to establish the guilt then it was the trial court's duty to instruct a verdict, and if the trial court failed in that duty it was the duty of the appellate court to rectify that error by reversing the judgment. This the appellate court did not do,

and which we think is in conflict with the *McLaughlin case, supra*.

The authorities are too well settled and too numerous to burden this court. The *Karn case supra* states the rule plainly. When charged with crime, a citizen is entitled to be tried in a fair and impartial manner according to law. He is entitled to be confronted with the witnesses against him. He is entitled to demand that the prosecution prove him guilty, not by suspicions, but by facts. When the prosecution fails, as it did utterly in this case, he is entitled to an instructed verdict.

In this case it is not a question of a difference of opinion (as suggested by the Court of Appeals) in which ordinary men may differ, but one in which the inescapable conclusion drawn from all the testimony both direct and circumstantial is that the conduct of petitioner was consistent with his innocence, thus bringing this case under the rule in *Karn* and *McLaughlin cases*. Not only is it true, but also the scienter is entirely missing.

Again we quote from the *Ridenour case* (3rd circuit) which itself quotes from the case of *Hart vs. United States*, 84 F. 799. "*Unless there is substantial evidence of facts which excludes every other hypothesis but that of guilt, it is the duty of the court to return a verdict for the accused; and where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.*"

The Circuit Court of Appeals in this case has so

far departed from the established rule of law as announced in the *Hart case* supra, as to call for an exercise of the courts supervisory powers.

None of the cases cited by the court in affirming the Randall case, can give any support to the court's departure. In *Ray vs. U. S.*, 114 F. (2d) 508, cited by the Circuit Court of Appeals, the facts were so far different from the instant case as to call for an entirely different rule of law. Beyond the fact that the defendants were in each case, indicted, tried and convicted there is little similarity between them and the present case.

In this *Ray case*, the Circuit Court of Appeals opinion citing would indicate that knowledge on the part of Randall was not necessary. But there has to be a mutual meeting of the minds. The *Ray case* is different from the *Randall case*, because the opinion in the *Ray case* stated: "She (the defaulting banker—parenthesis inserted) stated that she often throughout the period discussed the situation with him, that he promised to use the money from the sale of a Mine * * * to repay the bank, but that he always failed to do so." "He denied that his codefendant Shutte notified him of large overdrafts, or of her efforts and methods to conceal them." So, there was knowledge on the defendant's part, if the jury believed the banker's testimony. But, decidedly, that kind of testimony was not in the record in the *Randall case*.

CONCLUSION AND PRAYER

For the foregoing reason your petitioner, by his solicitor, respectfully prays that a Writ of Certiorari issue to the Circuit Court of Appeals for the Seventh Circuit, to the end that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

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HARRY R. RANDALL, *Petitioner*

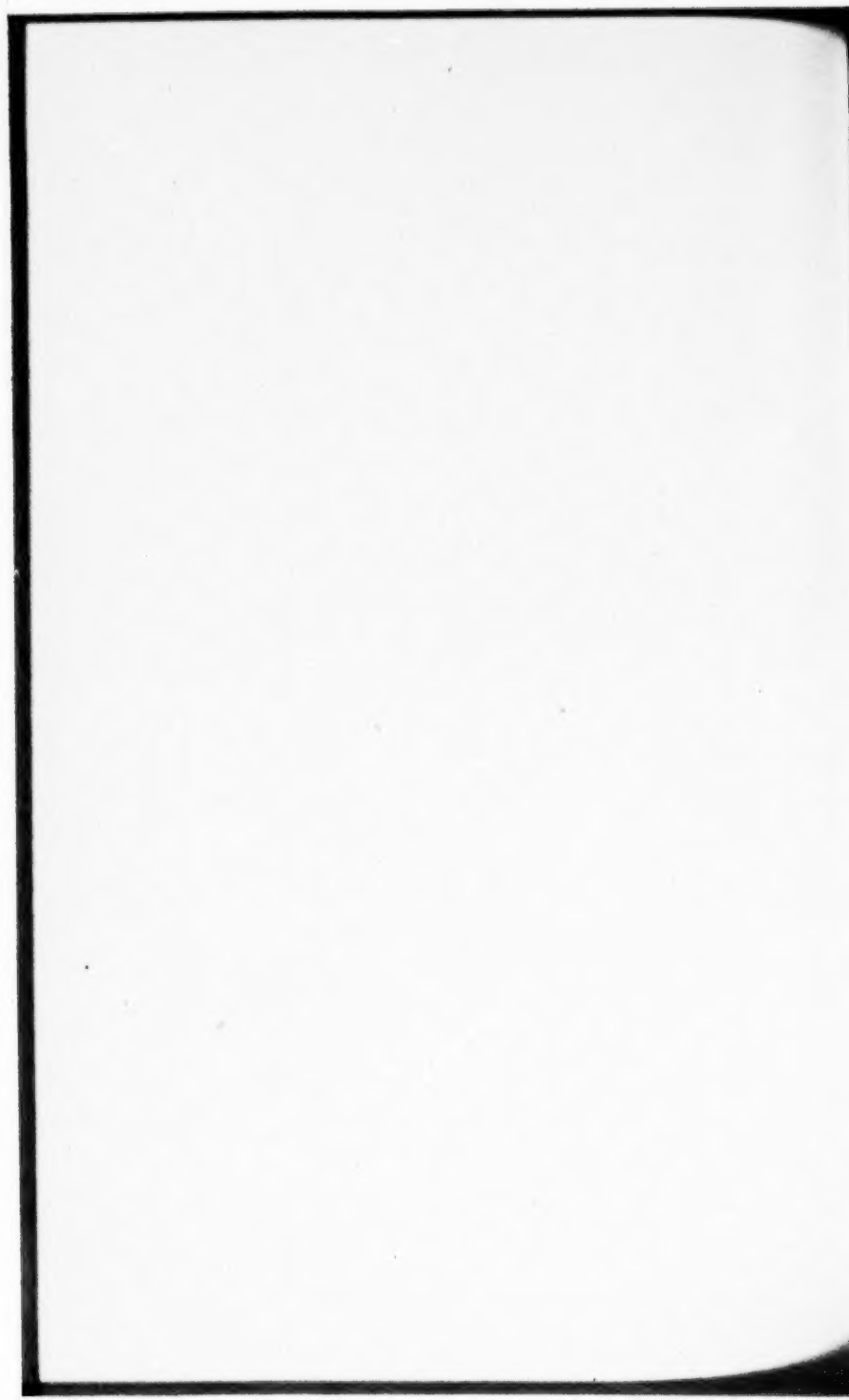
vs.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO BRIEF
IN OPPOSITION

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On Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Seventh Circuit

REPLY OF PETITIONER TO
RESPONDENT'S BRIEF

STATEMENT

(Jurisdictional matters and questions presented having heretofore been stated for brevity reference is made to such former statements.)

The Indictment in this cause charges the existence of a conspiracy to violate the banking laws. (R. 2.)

The evidence showed Randall was obtaining money by drawing checks on the National City Bank of Evansville. Further that Perry was paying those checks. That Perry and Petitioner talked at the bank and at Petitioner's office about repayment repeatedly and openly. That they had a thorough understanding

and there was nothing underhanded about the transaction (R. 136) continuing Sterling J. Perry testified:

"Q. Well, would you amplify a little more what you and he would say to each other about this when you would meet?

"A. Well, I didn't confide in him where the money was coming from at all. We discussed repayment—things like that. He was always trying to hit it, and he always promised to repay." (R. 136.)

Perry further testified that so far as he knew Petitioner did not know he (Perry) was taking the Bank's money. (R. 149.)

Again Perry testified that all the money furnished Petitioner was in payment of checks drawn by Petitioner on the bank and returned to Petitioner. (R. 151.)

Again Perry testified under questioning by prosecutor: That the reason he continued to pay the Randall checks was that he always had a feeling in trying to help people and that he was very sympathetic toward Mr. Randall. He was trying to do things, and I guess *I overestimated my depth*, and when I finally woke up to the situation I had too big a job on my hands. (R. 169.) That Perry had no financial interest in Petitioner's drilling business. (R. 170.)

On page 135 of the record nothing appears concerning any urgency, however, at R. 137 is found the following:

"Q. How often did you and Mr. Randall meet?

"A. Not so often. He wasn't in town a great deal.

"Q. Where did you meet?

"A. Well, we would go to lunch every once and a while, when he came to town off his trips, where he was promoting his trips like New York and Dallas—and he would come back and discuss the matter, and he would tell me his plans, and what he had done.

"Q. On this occasion he would discuss the urgency of getting this matter straightened up?

"A. Not every time.

"Q. But you did on occasions?

"A. Yes, sir."

ARGUMENT

1. Not only does Petitioner Randall contend that there was no proof that he knew that the money received from Perry came from misapplications of the bank's funds, but also Petitioner Randall contends that there is no evidence direct or circumstantial that any conspiracy existed between Randall and Perry. A conspiracy is an unlawful agreement expressed or implied. It is fundamental that no agreement can be made without the mutual assent of the contracting parties. Since there is no evidence, direct or circumstantial of any character, which would tend to support the Government's theory that an unlawful agreement was made, or an implied understanding existed, on Petitioner's part, that Perry would misapply funds of the bank, then the trial court should have sustained the motion for an instructed verdict. We have

advanced the argument and have cited numerous cases to support the contention of petitioner that in order for the proof to measure up to the requirements of the law in establishing a conspiracy by circumstantial evidence that the circumstances relied on by the Government *must be* required to point so surely and unerringly to the guilt of the defendant as to exclude every other reasonable hypothesis but that of guilt. Since Randall could not be guilty of conspiracy, regardless of what Perry did or did not, unless he had either expressly impliedly agreed to Perry's defalcation, it naturally follows that the proof does measure up to the requirement above stated.

We challenge the statement that Petitioner Randall knew his checks were not being cleared in the regular fashion and right of the Government to rely on such a circumstance to establish the existence of a conspiracy as frivolous.

The specious argument that the jury had a right to infer that businessmen do not obtain personal loans from the cashier of a bank by drawing checks on the bank itself falls of its own weight. Perry was an executive officer of the bank; he had a right, nay it was his duty, as a representative of the stockholders of the bank to loan money of the bank, and he likewise had a right to loan any of his own personal funds to any person to whom he thought was deserving. Some of the checks in evidence were given at distant points from the bank, nothing was simpler than to draw a check on the bank which is ordinarily accepted in a transaction whereas a personal draft on the cashier is

more often rejected than otherwise. The fact that Perry delivered the returned checks to Randall in a unorthodox manner lend great credence to theory that Randall believed himself to be a debtor of Perry and not of the bank. If this is true then Randall could not have been guilty of conspiracy, for in order for Randall to have been guilty of conspiracy he must have designed in his own heart that Perry should embezzle the very money he was receiving from Perry.

Moreover we challenge the argument of the Government that "Petitioner's practice of drawing checks on the bank for whatever expenses they had, regardless of whether or not they had funds in the bank, justified the inference that they had an understanding that Perry would see to it that their checks managed to clear the bank, and would use the bank's funds for that purpose." To follow that argument to its logical conclusion then every time a customer gives a no fund check on a national bank and it is paid the customer would be guilty of conspiracy, no matter what arrangement he might have had with an officer of the bank to pay the check out of the officer's own personal funds. The most that can be said is that Petitioner thought his check would be paid. The *Ray Case*, 114 F. 2d 508, cited by the respondent, stands on an entirely different footing, and no consolation can be drawn for respondent from it: The facts in the Ray case are substantially different, in that case the defendant Ray lived next door to the defaulting cashier; she was the god-mother of his child, she repeatedly discussed her accounts at the bank with the defendant, Ray, and they were so closely related that

it is hardly debatable that Ray knew of her operations at the bank.

Petitioner has no quarrel with the rule laid down in *United States vs. Socony-Vacuum Oil Co.*, 310 U. S. 150, at page 254 (84 L. Ed. 1129), that the question of law raised by the motion for instructed verdict was whether or not there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. Indeed, it is the burden of the petitioner's contention here that there is no evidence of a substantial nature to sustain the verdict of the jury and therefore the trial court should have instructed a verdict. There is a mass of irrelevant facts proved by the Government which tend to establish the guilt of Perry, but not one circumstance from which a jury might reasonably infer that petitioner entered into any unlawful conspiracy. and a casual reading of the record in this case will disclose that our contention is correct. In this land a man may not be convicted on suspicion. The other cases cited by the respondent add nothing to the *Socony-Vacuum case*.

Neither do we agree with respondent's unsupported conclusion that "in any event, by any standard of sufficiency of the evidence, the evidence here is sufficient."

Boiled down the evidence offered against Randall amount to:

- (1) Randall was acquainted with Sterling J. Perry.
- (2) Randall borrowed money from Sterling J. Perry.

- (3) Randall used a method of drawing checks on the bank which Perry honored.
- (4) Perry embezzled funds of the Bank, without Randall's knowledge.
- (5) Randall treated the matter as a loan from Perry individually.

Candidly, we do not see the remotest connection between this evidence and the indictment returned. All of the cases, even the *Glasser case*, 315 U. S. 60, 80 (86 L. Ed. 680, 704), holds that the evidence must be substantial. Substantial evidence means real evidence, solid evidence not seeming or imaginary evidence, not mere surmises or inferences, but in this case the trial court in order to overrule the motion of the defendant had to indulge inference upon inference.

The respondent's argument seems to be that Perry knew Randall, Randall borrowed money from Perry knowing him to be an officer of the bank, Perry embezzled funds, Randall's loan came from the embezzled funds, Perry is guilty, ergo, Randall's guilty.

2. Neither can we agree that with the contention of the respondent that Perry's defalcations were not in issue on petitioner's appeal. It is an elemental principal of law, that when an indictment is returned into court charging a defendant with an offense, and the defendant is arraigned and enters a plea of not guilty, then all the allegations contained in the indictment are thereby put in issue. We do not think it could be seriously contended here that if the jury in this case had refused to believe the testimony of Perry

and the supporting witnesses, that a verdict of not guilty could have and should have been rendered.

To brush aside the contention that District Judge Lindley was not qualified to sit as a member of the circuit court of appeals by saying "there is no merit in this contention," is hardly sufficient to dispose of so serious a matter.

Let us look for a moment at what really happened: Judge Lindley tried the Sterling J. Perry indictment, the fact that Perry pleaded guilty to the indictment does not alter the circumstances, Judge Lindley had to find him guilty on his plea, which was a trial of that fact as effectively as if Perry had pleaded not guilty. On the trial of the Randall case the question of the guilt or innocence of Perry was a material issue without which there would have been no case against either Perry or Randall. Therefore, the identical question which was presented in the Perry case was likewise presented in the Randall case, and Judge Lindley had already decided the *question* of Perry's guilt on the same state of facts in the district court, therefore under section 120 of the Judicial Code he was not qualified to sit on the appeal where that same question was to be reviewed, even though it was another case.

Petitioner respectfully calls the attention to the court that the respondent has cited no case by this court or any other court in support of its contention that there is no merit to the petitioner's position that Judge Lindley was disqualified. Indeed, petitioner believes that respondent has cited no such case for the

very good reason that none exists. To limit the disqualification in such a case to a Judge who had actually tried or at some time in the procedure had made some order in the very case on appeal would be to place limit on the meaning of the statute which from its reading could not be done fairly. Such a narrow construction of Section 120 of the Judicial Code would defeat the apparent purpose of Congress, i.e., to give the appellant the benefit of a judge or judges sitting on his appeal who had not theretofore sat in judgment on the question involved. This follows the underlying or basic principle of judicial procedure that no Judge should be permitted to sit in appeal on the propriety of any act of his own, or on correctness of any question which he may have decided already.

CONCLUSION

It is respectfully urged that the case of Bristol Hackbusch, No. 555 in this Court, is a separate and distinct transaction from the Randall case; that the records are entirely different, and that there is not a scintilla of evidence that Hackbusch and Randall had any connection with each other. We believe that a careful reading of record will bear out this contention, and we do not think that since the records are entirely different that they should be considered together.

For the foregoing reasons as well as those heretofore urged by the petitioner we respectfully submit that the petition of applicant, Harry R. Randall, should be granted.

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL
PETITION FOR WRIT OF CERTIORARI TO THE
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SEVENTH CIRCUIT AND SUPPLEMEN-
TAL PETITION AND SUPPORTING
BRIEF

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1. The fact that Judge Lindley as a district judge had tried and decided the question of whether or not Sterling J. Perry was guilty of the offenses alleged in the overt acts necessary in order to give life to the alleged conspiracy charged against Harry R. Randall disqualified him, Judge Lindley, from sitting on the trial and hearing of such questions in the circuit court of appeals	9-10
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*To The Honorable Chief Justice, and the Honorable
Associate Justices of The Supreme Court of the
United States of America:*

At this time comes the petitioner Harry R. Randall and respectfully asks leave of the court to file an additional or supplemental petition for writ of certiorari in addition to and supplementing his petition filed herein in this cause, and in support thereof he says that illness on the part of his counsel made it impossible for counsel coming into the case to properly prepare his original petition herein, and that in order that justice may be done he respectfully asks the court to permit him to file the petition and supporting brief hereto attached.

Wherefore he prays the court to enter a proper order admitting such supplemental petition and brief to be filed and considered in connection with such original petition.

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SUPPLEMENTAL AND AMENDED PETITION
FOR WRIT OF CERTIORARI TO THE CIR-
CUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

*To The Honorable Chief Justice, and the Honorable
Associate Justices of The Supreme Court of the
United States of America:*

**A. SUMMARY STATEMENT OF MATTERS
INVOLVED**

(Reference is here made to summary state-
ment contained on pages 1, 2 and 3 of petition
for Writ of Certiorari.)

**B. ADDITIONAL STATEMENT OF MATTERS
INVOLVED**

In Overt Act No. VII of the indictment it was
charged that Sterling J. Perry misapplied One

Thousand Dollars (\$1,000.00) of the moneys, funds and credits of said bank (meaning the National City Bank of Evansville, Ind. (R. 5.)

In Overt Act No. IX it was charged that Sterling J. Perry, director, agent, and employee of The National City Bank of Evansville, unlawfully misapplied One Hundred Dollars (\$100.00) of the moneys, funds, and credits of said bank. (R. 5.)

In Overt Act XI it was charged that on or about the third day of April, 1944, at Evansville, Vanderburgh County, Indiana, Sterling J. Perry, director, officer, agent, and employee of The National City Bank of Evansville, unlawfully misapplied One Thousand Dollars (\$1,000.00) of the moneys, funds, and credits, of said bank. (R. 5.)

The indictment further alleges in Overt Act No. XIII that on or about the 26th day of May, 1944, at Evansville, Vanderburgh County, Indiana, Sterling J. Perry unlawfully misapplied One Hundred Sixteen Dollars and Fifty-three Cents (\$116.53) of the moneys, funds and credits of said bank. (R. 6.)

The indictment further alleges in Overt Act XV that on or about the 15th day of August, 1944, at Evansville, Vanderburgh County, Indiana, Sterling J. Perry, director, agent, and employee of the National City Bank of Evansville, unlawfully misapplied One Hundred Twenty-five (\$125.00) Dollars of the moneys, funds and credits of said bank. (R. 6.)

That said indictment further charges in Overt Act XVII that on or about the 23rd day of August, 1944, at Evansville, Vanderburgh County, Indiana, Sterling J. Perry, director, officer, agent and employee of The National City Bank of Evansville, unlawfully misapplied Five Hundred Dollars (\$500.00). (R. 7.)

In said indictment it was charged in Overt Act XIX (R. 7) and in Overt Act XXI (R. 8) and in Overt Act XXIII (R. 8) and in Overt Act XXV (R. 9) and in Overt Act XXVII (R. 9) and in Overt Act XXIX (R. 10) that Sterling J. Perry, a director, officer, and agent of said bank, misapplied funds and credits of said bank.

In said indictment and in Overt Act XXXI it was charged that Sterling J. Perry made false entries to deceive the officers of said bank. (R. 10.)

In said indictment in Overt Act XXXII it was charged that Sterling J. Perry, officer, agent and employee of The National City Bank of Evansville, with intent to injure said bank and the Hercules Body Company unlawfully, knowingly, wilfully, and feloniously misapplied sixty-three thousand, five hundred four dollars and sixty-two cents (\$63,504.62) of the moneys, funds, and credits of said bank, by then and there crediting to the defendant, Harry R. Randall, the proceeds of a check. (R. 11.)

In said indictment in Overt Act XXXIII it was charged that Sterling J. Perry, a director, officer, agent and employee of The National City

Bank of Evansville, * * * misapplied Twelve Thousand, Five Hundred Dollars (\$12,500.00) of the moneys and credits of said bank. (R. 11.)

In said indictment in Overt Act XXXIV it was charged that Sterling J. Perry, a director, officer and employee of The National City Bank of Evansville, with intent to injure and defraud said bank * * * misapplied Twenty-nine Thousand Two Hundred Twenty Dollars and Fifty-two Cents (\$29,220.52) of the moneys and credits of said bank. (R. 11-12.)

The Defendant, Harry R. Randall was arraigned and entered a plea of Not Guilty to the indictment (R. 18).

The Defendant was convicted and appealed to the Circuit Court of Appeals for the Seventh Circuit, where the case was heard before Chief Justice SPARKS, Associate Justice KERNER, and District Judge LINDLEY, the case was affirmed. Opinion by KERNER, Circuit Judge, Chief Justice SPARKS dissenting.

For the substantive offense involved in this transaction Sterling J. Perry was indicted in the Southern District of Indiana, tried and convicted and sentenced by JUDGE LINDLEY. (See certified Copy of Indictment and Judgment—Appendix A and B.)

Count II charged that Harry R. Randall aided and abetted Sterling J. Perry in all the offenses charged against Sterling J. Perry in an indictment in the Southern District of Indiana under criminal number 8575. (R. 12.)

JURISDICTION

The jurisdiction of this court is invoked under Judicial Code, Section 256, as amended (28 U. S. C. A. 37a) and Judicial Code, Section 120, as amended (28 U. S. C. A. 216). The judgment of the Court of Civil Appeals was entered November 3, 1947 (R. 347). Rehearing was Denied December 8, 1947 (R. 361).

QUESTIONS INVOLVED

(In addition to the questions set forth in the original petition for writ of certiorari the following questions are presented.)

- I. Where a District Judge in the same district as a trial court has decided a question involved in the appeal, although in a different cause, he is disqualified from sitting at the trial or hearing of the appeal.**

SPECIFICATION OF ERROR

The Circuit Court of Appeals committed an error in permitting the Honorable WALTER J. LINDLEY, a District Judge who had decided the identical question in another case to sit in judgment on the appeal of the case at bar.

The Circuit Court of Appeals erred in permitting Judge LINDLEY to participate in the appeal of the case against Harry R. Randall, charged with conspiracy to violate the banking Act; and also charging in the overt acts that Sterling J. Perry had violated the banking act as a part of such conspiracy, because Judge LINDLEY had theretofore tried and decided

the identical questions involved in the appeal, although in a different case, in violation of section 120 of the Judicial Code. (Title 18, sec. 216, U. S. C. A.)

LAWS INVOLVED

Section 88, Title 18, U. S. C. A. (Section 37 of the Criminal Code) and Sections 221-225 and Section 264, Title 12, U. S. C. A.; and Section 120 of the Judicial Code (Title 28, Section 216 of U. S. C. A.).

ADDITIONAL REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The fact that Judge LINDLEY as a District Judge had tried and decided the question of whether or not Sterling J. Perry was guilty of the offenses alleged in the overt acts necessary in order to give life to this alleged conspiracy charged against Harry R. Randall disqualified him, Judge LINDLEY, from sitting on the trial or hearing of such question in the circuit court of appeals.

The United States not only alleged the various offenses charged in the overt acts but proceeded to prove them by testimony; all of the charges in the indictment, including the overt acts, were put in issue when the defendant Randall entered a plea of *Not Guilty* and proof of one or more overt acts is necessary.

Whether or not the defendant Randall was guilty of the offense charged in the indictment was the question before the Circuit Court of Appeals; indeed the Circuit Court of Appeals itself says "That the question is whether or not the verdict is supported by any

substantial evidence, direct or circumstantial." (R. 349.)

Again we direct the attention of the court to the language used by the Circuit Court of Appeals in the Randall case (page 349 of the Record) and we quote:

"There is no dispute concerning the fact that Perry embezzled and misapplied the funds of the bank, nor is there any dispute that at least \$16,335.98 of his shortage of the bank's funds was misapplied by Perry to Randall's no-fund checks."

The embezzlement of the witness Perry was of course disputed by the defendant Randall's *plea of Not Guilty*. And since Judge LINDLEY had already decided the question of the guilt of Perry in the trial of his, Perry's case, then it naturally follows that under the provisions of Section 120 of the Judicial Code that he, Judge LINDLEY, would be disqualified from sitting on a hearing involving that same question in the Circuit Court of Appeals.

We respectfully direct the court's attention to the holding in *Rexford vs. Brunswick-Balke-Collender Co.*, 228 U. S. 339, 57 L. ed. 864, and we quote:

"It is the manifest purpose to require that Circuit Court of Appeals be composed in every hearing of judges none of whom will be in the attitude of passing upon the propriety, scope or effect of any ruling of his own made in the progress of the cause in the court of first instance, and to this end the disqualification is made to arise, not only when the judge has tried or heard the whole

cause in the court below, *but also when he has heard or tried any question therein which it is the duty of the Circuit Court of Appeals to consider and pass upon.*"

The Circuit Court of Appeals insists that it is its duty in this case to determine whether or not there was evidence to support the jury's finding. Finding of what? That the defendant Randall was guilty as *charged in the indictment*. The defendant, Randall, was charged with having conspired with Sterling J. Perry to abstract money from the National City Bank of Evansville. In order to so find under the indictment as pleaded the jury had to find that Perry had committed the abstractions alleged in the indictment. This question was in issue before the Circuit Court of Appeals in the Randall case before Judge LINDLEY, it was likewise before the trial court in the Perry case, before Judge LINDLEY.

2. The proper remedy where a District Judge sat on a case on an appeal and the same question had been theretofore decided by him, although in a different case, is certiorari.

Sterling J. Perry testified "I am the same Sterling J. Perry who was indicted and pleaded guilty to an indictment returned in this court on June 24, 1946, under No. 8575 Criminal, charging a number of violations in connection with my work in the National City Bank of Evansville." (R. 124.)

The indictment in cause No. 8575 Criminal involved the identical defalcations alleged as overt acts of indictment in the present case. Judge LINDLEY sat

on the trial of the case against Sterling J. Perry in cause No. 8575 Criminal, Judge LINDLEY sat as an appellate Judge in the present case. (See indictment Case No. 8575 Criminal, Certified copy of Judgment in Case No. 8575 Criminal.)

In the case of *Wm. Cramp & Sons Ship and Engine Building Company vs. International Curtis et al*, 228 U. S. 645; 57 L. ed. 1003, it was held in substance: That certiorari will issue from the Supreme Court to the Circuit Court of Appeals where a judge who heard and disposed of the case in the first instance also sat in the court of appeals.

This is even true where no objection to the sitting of such Judge was made in the court below. The court will appreciate the difficulty arising with respect to making objections to a District Judge sitting on the case on appeal as counsel for the Defendant-Appellant would hardly have first hand information as to the personnel of the Circuit Court sitting in judgment on his appeal.

While it is not here contended that Judge LINDLEY sat on the trial of the Randall case in the first instance, it is however the position of the petitioner that he was disqualified from sitting on appeal in the Randall case for the reason that identical questions had theretofore been decided by Judge LINDLEY not only questions of law, but also questions of fact as well.

The applicable portion of Section 120 of the Judicial Code reads as follows:

"No judge before whom a cause or *question* may have been *tried or heard* in a *district court*, or existing circuit court, shall sit on *trial or hearing* of such cause or *question* in the circuit court of appeals." (Italics ours.)

Therefore since Judge LINDLEY had decided the question of fact in the *Perry case* which was identical with that of the *Randall case*, it is our belief that this petition for certiorari should be granted, because of his evident disqualification.

CONCLUSION AND PRAYER

For the foregoing reasons as well as the reasons set forth in his original petition for a writ of certiorari filed herein, the petitioner by his solicitor, respectfully prays, that a Writ of Certiorari issue to the Circuit Court of Appeals for the Seventh Circuit, to the end that this cause may be reviewed and determined by this court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

MARVIN B. SIMPSON, SR.,
Fort Worth National Building
Fort Worth, Texas

LEM BILLINGSLEY
First National Bank Building
Fort Worth, Texas

MACK TAYLOR
711 Fort Worth National Building
Fort Worth, Texas

Attorneys for Petitioner.

APPENDIX A

United States of America,	} ss.
Southern District of Indiana	

IN THE

DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana

Indianapolis Division

May Term, 1946

UNITED STATES OF AMERICA	} No. 8575
vs.	
STERLING J. PERRY	

Criminal

The Grand Jurors of the United States, within and for the Southern District of Indiana, impaneled, sworn, and charged in said Court at the term and division aforesaid, to inquire for the United States for the Southern District of Indiana, upon their oaths charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on or about the 25th day of March, 1946, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal

Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law, by with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 25th day of March, 1946, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the Board of Directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and said Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously and without authority from the Board of Directors of said member bank, misapply certain of the moneys, funds, and credits of said member bank in the amount of one hundred thousand dollars (\$100,000.00) and of that value, a more particular description of said moneys, funds, and credits being to the Grand Jurors unknown, all with the intent on the part of said defendant to convert said moneys, funds, and credits to his own use and to the

use of other persons, companies, and corporations, the names and descriptions of all of which are to the Grand Jurors unknown, in the following manner and by the following means: said defendant, in his aforesaid capacity, did then and there apply said one hundred thousand dollars (\$100,000.00) received by him from the sale of securities entrusted to his care by William Shear, a customer of said bank, to take up cash items in a like amount, which cash items had previously been accumulated and held by him in said bank, a more particular description of which cash items is to the Grand Jurors unknown.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT II

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on the 30th day of January, 1946, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits

of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 30th day of January, 1946, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, through the power, control, direction, and management which he had and possessed as such vice-president over the moneys, funds and credits of said member bank, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, feloniously, and with the intent to injure and defraud said member bank and other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, embezzle and appropriate to his own use from said member bank certain of the moneys, funds, and credits of said member bank of the value of one thousand two hundred forty-seven dollars and thirty-one cents (\$1,247.31), a more particular description of which said moneys, funds, and credits is to the Grand Jurors unknown, which said moneys, funds, and credits had theretofore come into his possession and under his control by virtue of his aforesaid position with and in said member bank.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT III

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on the 30th day of January, 1946, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 30th day of January, 1946, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the Board of Directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said mem-

ber bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously make and cause to be made a false entry on the general statement of said bank for January 30, 1946, in that said entry, as so made and caused to be made, reflected a balance of forty-three thousand four hundred thirty dollars and nineteen cents (\$43,430.19), whereas, said balance in said remittance account in said bank statement for January 30, 1946, should have been the amount of forty-two thousand one hundred eighty-two dollars and eighty-eight cents (\$42,182.88), all as the defendant then and there well knew at the time he made said false entry and caused the same to be made as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT IV

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on the 20th day of September, 1945, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then

existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the law of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 20th day of September, 1945, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the Board of Directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously and without authority from the Board of Directors of said member bank, misapply certain of the moneys, funds, and credits of said member bank in the amount of sixty-three thousand

five hundred four dollars and sixty-two cents (\$63,504.62), and of that value, a more particular description of said moneys, funds, and credits being to the Grand Jurors unknown, all with intent to convert said moneys, funds, and credits to his own use and to the use of other persons, companies, and corporations, the names and descriptions of all of which are to the Grand Jurors unknown, in the following manner and by the following means: said defendant, in his aforesaid capacity, did then and there misapply a check in the amount of sixty-three thousand dollars five hundred four dollars and sixty-two cents (\$63,504.62), that date received to the credit of the account of H. R. Randall, special account; whereas, said check should have been credited to the account of Hercules Body Company in and with said bank, as the defendant then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT V.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on the 31st day of July, 1944, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville,

in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 31st day of July 1944, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the Board of Directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously and without authority from the Board of Directors of said member bank, misapply certain of the moneys, funds, and credits of said member bank in the amount of one hundred twenty thousand dollars (\$120,000.00), and of that value, a more particular

description of said moneys, funds, and credits being to the Grand Jurors unknown, all with intent to convert said moneys, funds, and credits to his own use and to the use of other persons, companies, and corporations, the names and descriptions of all of which are to the Grand Jurors unknown, in the following manner and by the following means: said defendant, in his aforesaid capacity, did then and there misapply a certain one hundred twenty thousand dollar (\$120,000.00) check of Southern Indiana Gas and Electric Company payable to the order of Commonwealth and Southern to be credited to the following accounts and in the following amounts:

Hercules Body Company	\$71,487.37
Bristol Hackbush, special account.....	6,500.00
Bristol Hackbus, special account.....	14,512.63
H. R. Randall, special account.....	12,500.00
J. L. Taylor account.....	6,500.00
J. L. Taylor account.....	8,500.00

whereas, said check should have been credited to the account of the Philadelphia National Bank of Philadelphia, Pennsylvania, all as the defendant then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT VI

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on the 9th day of August, 1944, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 9th day of August, 1944, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the Board of Directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers

of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously make and cause to be made a false entry on the general statement of said bank for August 9, 1944, in that said entry, as so made and caused to be made reflected a balance of ninety-eight thousand two hundred seventy-one dollars and forty-nine cents (\$98,271.49) in the remittance account, whereas, in truth and in fact, the balance in said remittance account for said August 9, 1944, should have been seven thousand seven hundred seventy-one dollars and forty-nine cents (\$7,771.49), all as the defendant then and there well knew at the time he made said false entry and caused the same to be made as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT VII

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on the 29th day of August, 1944, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then

existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 29th day of August, 1944, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the Board of Directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politics, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously make and cause to be made a false entry on the general statement of said bank of August 29, 1944, in that said entry, as so made and caused to be made reflected a balance of one hundred twenty-one

thousand two hundred eighteen dollars and nineteen cents (\$121,218.19) in the remittance account, whereas, in truth and in fact, the balance in said remittance account for said 29th day of August, 1944, should have been forty-six thousand two hundred eighteen dollars and nineteen cents (\$46,218.19), all as the defendant then and there well knew at the time he made said false entry and caused the same to be made as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT VIII

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on the 24th day of February, 1945, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under

and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 24th day of February, 1945, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the Board of Directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously and without authority from the Board of Directors of said member bank, misapply certain of the moneys, funds, and credits of said member bank in the amount of one hundred forty-three thousand one hundred twenty-nine dollars and fifty-two cents (\$143,129.52), and of that value, a more particular description of said moneys, funds, and credits being to the Grand Juors unknown, all with intent to convert said moneys, funds, and credits to his own use and to the use of other persons, companies, and corporations, the names and descriptions of all of which are to the Grand Jurors unknown, in the following manner and by the following means: said defendant, in his aforesaid capacity, caused the following accounts

to be credited in the following amounts:

The Ingle Coal Company.....	\$50,000.00
The Hercules Body Company.....	63,900.00
H. R. Randall, special account.....	29,229.52

whereas, in truth and in fact, said one hundred forty-three thousand one hundred twenty-nine dollars and fifty-two cents (\$143,129.52) should have been credited to the account of Indiana National Bank of Indianapolis, at Indianapolis, Indiana, all as the defendant then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT IX

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on the 27th day of February, 1945, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with

the provisions of law, by, with and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 27th day of February, 1945, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the Board of Directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously make and cause to be made a false entry in a book of said member bank then and there of and among the books regularly kept at, in, and by said member bank in the due course of business therein and known as the general ledger on a loose leaf sheet thereof reflecting the deposits and withdrawals of the account of The Hercules Body Company, of Evansville, Indiana, which entry purports to show and in effect does indicate and declare that the said The Hercules Body Company had a balance of only three hundred two thousand nine hundred ninety-six dollars and

eighty-nine cents (\$302,996.89) in said account at the close of business on February 27, 1945, whereas, in truth and in fact, the said The Hercules Body Company had a true balance in said account on said date of four hundred twenty-three thousand nine hundred ninety-six dollars and eighty-nine cents (\$423,996.89), all as the defendant then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT X

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on the 27th day of May, 1946, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing

business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 27th day of May, 1946, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, through the power, control, direction, and management which he had and possessed as such vice-president over the moneys, funds, and credits of said member bank, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, feloniously, and with the intent to injure and defraud said member bank and other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, embezzle and appropriate to his own use from said member bank certain of the moneys, funds, and credits of said member bank of the value of one hundred forty-two thousand seven hundred sixty-five dollars and thirty-seven cents (\$142,765.37), a more particular description of which said moneys, funds, and credits is to the Grand Jurors unknown, which said moneys, funds, and credits had theretofore come into his possession and under his control by virtue of his aforesaid position with and in said member bank.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT XI

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY,

late of said district, at and in the Evansville Division thereof, was on the 27th day of May, 1946, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District, No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation therefore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 27th day of May, 1946, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, through the power, control, direction, and management which he had and possessed as such vice-president over the moneys, funds, and credits of said member bank, did then and there within the jurisdiction of this Court unlawfully, wilfully, knowingly, feloniously, and with the intent to injure and defraud

said member bank and other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, embezzle, abstract, and wilfully misapply certain moneys, funds, and securities in the amount and of the value of one hundred forty-two thousand seven hundred sixty-five dollars and thirty-seven cents (\$142,765.37), which said moneys, funds, and securities had theretofore been entrusted to him, said defendant, in his aforesaid capacity as an agent and employee of The National City Bank of Evansville, a Federal Reserve agent, a more particular description of which said moneys, funds, and securities, is to the Grand Jurors unknown.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

12 USCA 592.

Signed: B. HOWARD CAUGHRAN,
B. Howard Caughran
United States Attorney.

ENDORSEMENTS:

No. 8575

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

.....Division

THE UNITED STATES OF AMERICA

vs.

STERLING J. PERRY

INDICTMENT

Violation of National Bank Act.

Vio. Sec. 592, Title 12, USCA

A true bill,

(signed) George Fred Rieman
Forman.

Filed in open court this 14 day of June, A. D. 1946.

Albert C. Sogemeier, *Clerk*

Bail, \$10,000.00

CERTIFIED COPY

United States of America }
 Southern District of Indiana } ss.

Indianapolis Division

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the annexed and foregoing is a true and full copy of an indictment returned and filed June 14, 1946, in the cause of United States of America vs. Sterling J. Perry, No. 8575 Criminal now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 19th day of September, A. D. 1946.

(S E A L)

(Signed) ALBERT C. SOGEMEIER,
 Albert C. Sogemeier
Clerk.

By (Signed) DOROTHY G. PHIPPS,
 Dorothy G. Phipps,
Deputy Clerk.

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	}	No. 8575 Criminal
vs.		
STERLING J. PERRY		

At Indianapolis in said District on
the 19th day of June, 1946, before the
Honorable Robert C. Baltzell, Judge.

Comes now B. Howard Caughran, Esq., Attorney for the United States, and comes also the defendant, Sterling J. Perry, in his own proper person, and it appearing to the Court that the defendant appears in court without counsel, said defendant now states in open court that he has had the assistance and advice of counsel and for the purpose of arraignment desires to waive the presence of his counsel, and that he thoroughly understands the charge against him.

The defendant now being arraigned upon the indictment herein, for plea thereunto, says that he is guilty as charged therein, and said defendant requests that judgment be rendered in the Indianapolis Division of this District.

It is ordered by the Court that this cause be continued for investigation by the Probation Officer of this Court.

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	}	No. 8575
vs.		Criminal
STERLING J. PERRY		

At Indianapolis, in said District, on
the 27th day of June, 1946, before the
Honorable Walter C. Lindley, Judge.

Comes now B. Howard Caughran, Esq., Attorney for the United States, and comes also the defendant, Sterling J. Perry, in his own proper person and by his attorney, Edward E. Meyer, and this cause having been continued for investigation by the Probation Officer of this Court, and the Probation Officer having made his report to the Court, said Attorney for the United States now moves the Court for sentence and judgment upon the plea of guilty heretofore made and entered herein, the defendant having heretofore requested that disposition be made in the Indianapolis Division of this District.

The defendant having been asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court.

It is therefore considered and adjudged by the Court that the defendant, Sterling J. Perry, is guilty of each of the offenses charged in the indictment.

It is further considered and adjudged by the Court that said defendant, Sterling J. Perry, for the offense

charged in Count I of the indictment be committed into the custody of the Attorney General of the United States or his authorized representative for imprisonment and confinement for a period of Five (5) years in an institution to be designated by said Attorney General or his authorized representative.

It is further considered and adjudged by the Court that said defendant, Sterling J. Perry, for the offense charged in Count II of the indictment be committed into the custody of the Attorney General of the United States or his authorized representative for imprisonment and confinement for a period of Five (5) years in an institution to be designated by said Attorney General or his authorized representative, and that said imprisonment of Five (5) years be consecutive and cumulative with and begin at the termination of the sentence imposed on Count I of the indictment.

It is further considered and adjudged by the Court that said defendant, Sterling J. Perry, for the offense charged in Count III of the indictment be committed into the custody of the Attorney General of the United States or his authorized representative for imprisonment and confinement for a period of Five (5) years in an institution to be designated by said Attorney General or his authorized representative, and that said sentence shall be consecutive and cumulative with the sentence imposed herein on Counts I and II and begin at the termination of the sentence on Count II of the indictment.

It is further considered and adjudged by the Court that the said defendant, Sterling J. Perry, pay unto

the United States of America a fine in the sum of Five Thousand Dollars (\$5,000.00) as a part of the judgment on Counts I, II and III of the indictment, and that he be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is further considered and adjudged by the Court that the imposition of sentence on each of the Counts IV, V, VI, VII, VIII, IX, X and XI inclusive of the indictment be, and the same is, hereby suspended, and upon the release of the defendant from the service of the sentences hereinbefore imposed upon him, said defendant is to be and remain under the supervision of the Probation Officer of this Court under probation for a period of Three (3) years during the good behavior of said defendant unless the Court otherwise directs.

(Signed) Walter C. Lindley, Judge.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	}	No. 8575
vs.		Criminal
STERLING J. PERRY		

WARRANT TO MARSHAL TO DELIVER
CONVICT TO THE ATTORNEY GENERAL
OF THE UNITED STATES

*The President of the United States to the Marshal of
Said District—Greeting:*

WHEREAS, By the judgment of the District Court of the United States, in and for said District, at the May Term thereof, on the 27th day of June, A. D. 1946, STERLING J. PERRY who before, in said Court, had been convicted of record of the crime of Violation of National Bank Act, Section 592, Title 12, USCA, was sentenced therefore to be imprisoned in an institution to be designated by the Attorney General of the United States or his authorized representative for the term of Five (5) Years on Count I; Five (5) Years on Count II; Five (5) Years on Count III, which sentences are to be consecutive and cumulative, and to pay a fine on said Counts I, II and III of Five Thousand Dollars (\$5000.00) and stand committed until said fine is paid or discharged. Imposition of sentence suspended on Counts IV, V, VI, VII, VIII, IX, X and XI of the indictment, and upon release of defendant from service of his sentence, said defendant is to remain under the supervision of the

Probation Officer of this court under probation, for a period of Three (3) Years.

You are, therefore, hereby commanded to deliver the body of said Sterling J. Perry into the custody of the Attorney General of the United States, to undergo the execution of said sentence.

WITNESS, the Honorable Walter C. Lindley, Designated Judge of the District Court of the United States, for the Southern District of Indiana, and the seal of said District Court, this 27th day of June, A. D. 1946.

Albert C. Sogemeier, Clerk.

(SEAL)

MARSHAL'S RETURN ON PRISON WARRANT

The within named, Sterling J. Perry, has been in continuous custody under sentence in the Marion County jail at Indianapolis, Indiana, since June 27, 1946.

(signed) Julius J. Wichser

Julius J. Wichser, U. S. Marshal

Received this writ at Indianapolis, Indiana, on June 28, 1946, and executed same by delivering the within named, Sterling J. Perry, into the custody of the Warden, United States Penitentiary, at Terre Haute, Indiana, together with Certified Copy of Sentence and Judgement, on June 28, 1946.

Julius J. Wichser, U. S. Marshal

By: (signed) Edgar Collins, Deputy

CERTIFIED COPY

United States of America }
Southern District of Indiana } ss.

Indianapolis Division

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the annexed and foregoing is a true and full copy of an Order made and entered June 19, 1946, Sentence and Judgment made and entered June 27, 1946, and of Prison Warrant issued June 27, 1946 with the Marshall's return endorsed thereon, in the cause of United States of America vs. Sterling J. Perry, No. 8575 Criminal, now remaining among the records of said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis this 19th day of January, A. D. 1948.

(S E A L)

(Signed) ALBERT C. SOGEMEIER,
Albert C. Sogemeier, *Clerk.*

By (Signed) DOROTHY G. PHIPPS,
Dorothy G. Phipps
Deputy Clerk.

ENDORSEMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA

vs.

STERLING J. PERRY

No. 8575 Criminal

CERTIFIED COPY

of

Order made and entered June 19, 1946

Sentence and Judgment

Prison Warrant

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 509

HARRY R. RANDALL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 555

BRISTOL HACKBUSCH, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the majority in the circuit court of appeals (No. 509, R. 347-355; No. 555, R. 171-179), one judge dissenting without opinion, has not yet been reported.

(1)

JURISDICTION

In No. 509, the judgment of the circuit court of appeals was entered November 3, 1947 (R. 346, 355), and a petition for rehearing was denied December 3, 1947 (R. 361). The petition for a writ of certiorari was filed January 2, 1948.

In No. 555, the judgment of the circuit court of appeals was entered November 3, 1947 (R. 179-180), and a petition for rehearing was denied on December 3, 1947 (R. 215). On December 29, the Chief Justice extended petitioner's time to file a petition for a writ of certiorari to February 1, 1948 (R. 216). The petition was filed on January 29, 1948.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

As to each petitioner:

1. Whether the evidence is sufficient to support the verdict.

2. Whether District Judge Lindley was disqualified from sitting as a member of the circuit court of appeals because he had previously sentenced the person named as a co-conspirator on his plea of guilty to an indictment charging substantive offenses.

Petitioner Hackbusch also raises the following question:

3. Whether the trial court coerced the jury when it sent them back for further deliberations.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

R. S. 5209, as amended (12 U. S. C. 592), provides in pertinent part:

Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank as defined in the Act of December twenty-third, nineteen hundred and thirteen, known as the Federal Reserve Act, or of any national banking association, or of any insured bank as defined in subsection (c) of section 12B of the Federal Reserve Act, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of such Federal reserve bank or member bank, or such national banking association or insured bank * * * or who makes any false entry in any book, report, or statement of such Federal reserve bank or member bank, or such national banking association, or insured bank, with

intent in any case to injure or defraud such Federal reserve bank or member bank, or such national banking association or insured bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank or member bank, or such national banking association or insured bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member bank, or such national banking association or insured bank, or the Board of Governors of the Federal Reserve System; * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than \$5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court.

Section 120 of the Judicial Code (28 U. S. C. 216) provides in pertinent part:

* * * In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignments shall be designated by the court. No judge before whom a cause or question may have been tried or heard in a district court, or exist-

ing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

STATEMENT

Petitioners were separately indicted and separately tried for conspiring with one Sterling J. Perry to violate the Banking Act by having Perry, an officer of the National City Bank of Evansville, Indiana, a national and federally insured bank, misapply funds of the bank, and cause false entries to be made in the books and reports of the bank with intent to defraud the bank and deceive its officers, the Comptroller of the Currency, and bank examiners (No. 509, R. 2-12; No. 555, R. 2-12). Each was convicted (No. 509, R. 325; No. 555, R. 147), and each was sentenced to imprisonment for two years and to pay a fine of \$5,000 (No. 509, R. 333-334; No. 555, R. 154). On appeal, the judgments against petitioners were affirmed (No. 509, R. 355; No. 555, R. 179-180).

Although the cases were separately tried, the schemes proved and the contentions of petitioners were so similar that the circuit court of appeals treated the appeals in both cases in one opinion, and for the same reasons, we treat the cases together in this brief. Each case involves the relationship of the petitioner with Sterling J. Perry, an officer of the National City Bank of Evansville, who, at the times in question here, held the position of cashier and vice-president.

In each case, it was established without dispute that in May 1946, Perry admitted that he had embezzled and misapplied \$142,000 of the bank's funds. (No. 509, R. 33, 37-38, 41, 124-125; No. 555, R. 26-28, 85, 101.) It is not disputed that petitioners received substantial sums from Perry, as set forth below. The question at issue in each case was whether the petitioner knew that the money so received was the bank's money obtained by Perry through misapplication of the bank's funds.

The Government's evidence against Randall (No. 509) may be summarized as follows:

Perry met Randall in 1939, and in the years 1940 and 1941, loaned him, from personal funds, small sums of money which were repaid (R. 124, 125, 127). In 1943, Randall's demands on Perry became heavier (R. 127), and Perry began to cash Randall's personal checks with funds of the bank, taking money from the bank's cash drawer and making false entries in the bank records (R. 132-133). He would keep the checks in a drawer and eventually deliver a group of them to Randall (R. 132-133). Randall had a personal account in the bank only for the period from June 16, 1939, to July 2, 1941 (Gov. Ex. B-1, R. 60, 164).

In September 1943, Perry decided that this method of handling the transactions was too loose, and he opened an account in the name of S. Hackran (representing a combination of the names of Hackbusch and Randall) (R. 132, 134-

135; Gov. Ex. B-5, R. 61). However, only one check for a thousand dollars drawn by Randall was paid out of that account (R. 119-120, 167, 180). Perry apparently continued to cash Randall's personal checks by using money from the cash drawer (R. 168-169).

In February 1944, Perry opened an account in the name of Randall, which was known as the "Randall Red Special Account" to distinguish it from another special account carried by Randall (R. 131, 137-138; Gov. Ex. B-5, R. 61). Perry deposited in this account money misapplied from other funds of the bank (R. 144-145). Perry would debit the account with money which he paid for Randall's rent and living expenses, and would also clear through that account personal checks drawn by Randall (R. 137-141). Randall had a number of accounts in the bank at the time, but on none was payment authorized on his personal signature without special designation (R. 137-138, 145-146, 165-167; see R. 60-62). Perry would collect the checks and debit memoranda and deliver them in batches to Randall, totalling the amount on an adding machine tape (R. 133, 150, 161). Randall never received a bank statement accounting for his personal checks, although he did receive regular statements on his other accounts (R. 151, 161, 252, 284).

During the period from February 1944, when the special account was opened, until May 1946,

when Perry confessed, a total of \$16,335.98 was given to Randall (R. 180-181). Perry estimated that in all he had given Randall about \$50,000 (R. 134).

Perry testified that he did not tell Randall of the accounts he had opened and did not tell him in so many words that he was using the bank's money to cover Randall's checks (R. 149, 150, 152, 161). He did say that he and Randall had discussed the situation, and that Randall knew the matter was urgent (R. 135).

Randall took the stand in his own behalf and testified that he thought Perry was lending him money on his own account (R. 245, 247). He admitted that when he issued checks with his personal signature, he did not expect the checks to be charged to any of his regular accounts in the bank (R. 273-274). He stated, "that was the account that I was borrowing money from Mr. Perry personally, and he was taking care of for me" (R. 273). He testified that he kept no check stubs for the checks issued on his personal signature, and relied on Perry's figures (R. 281-282).

At the end of December 1943, Randall had his accountant total the checks delivered to him by Perry, which amounted to about \$8,900 and had the amount of \$10,000 posted on his books as a debt to Perry (R. 210-211, 254). Randall testified that at that time he gave Perry a note for \$10,000, and subsequently signed notes for the amounts received in later years (R. 253, 277,

279-280). Perry testified that he never received a note from Randall (R. 308-309).

In submitting the case to the jury, the judge instructed them that if they found that Randall in good faith believed that the money he received was loaned to him out of Perry's personal funds, and that Randall had no knowledge that Perry was cashing the checks with the bank's money, Randall could not be found guilty (R. 322). He also charged that if Randall had an understanding with Perry which would require Perry to misapply funds of the bank, Randall could be found guilty of conspiracy even though the jury did not find that he knew of the particular manner in which Perry handled the funds (R. 322-323).

The Government's evidence against Hackbusch (No. 555) may be summarized as follows:

Perry met Hackbusch about the middle of 1942, and occasionally made small loans to him (R. 86, 97). Hackbusch had an account in the bank in his name as trustee (R. 87; Gov. Ex. C-1, R. 49). Perry started cashing checks drawn by Hackbusch for which Hackbusch did not have sufficient funds on deposit, and used for that purpose money in the cash drawer of the bank. Perry would hold the checks, and when Hackbusch's account had sufficient funds, Perry would charge as many checks as possible back into Hackbusch's legitimate account (R. 91). In September 1943, Perry opened the S. Hackran account in which he

deposited money misapplied from the bank's funds (R. 89, 91). Through that account, he cleared checks, bearing Hackbusch's signature, for which Hackbusch did not have sufficient funds in his regular account (R. 92).

On January 22, 1944, Perry opened a special account in the name of Hackbusch, again using money misapplied from the funds of the bank (R. 93). At the time he opened that account, he had 13 checks drawn by Hackbusch totalling \$700 (R. 93). Through that account, he cleared those and other checks drawn by Hackbusch (R. 93). According to the records of the bank, Hackbusch received, through Perry's cashing of his checks, \$27,582.91 above the amounts deposited in his regular account (R. 121).

Hackbusch received statements on his legitimate trustee account but received no statements of the accounts set up by Perry (R. 97). Perry would accumulate the checks he cleared and deliver them in batches to Hackbusch, totalling the amounts of those delivered on adding machine tape (R. 98). Hackbusch never questioned Perry about the fact that the checks which he had drawn did not appear on his regular bank statements (R. 109).

In a credit statement made by Hackbusch on May 23, 1944, he failed to list any indebtedness either to Perry or the bank (Gov. Ex. 0-4, R. 81).

Perry estimated that he had given Hackbusch

between 40 and 50 thousand dollars of the bank's money (R. 96).

Hackbusch did not take the stand in his own behalf. His motion for a judgment of acquittal was denied by the trial judge (R. 148-151).

The judge's instructions to the jury as to the element of Hackbusch's knowledge of Perry's activities were similar to those given in the Randall case (R. 137-138; see, *supra*, p. 9).

ARGUMENT

1. Each of the petitioners contends that there was no proof that he knew that the money received from Perry came from misapplication of the bank's funds, and hence that the evidence was insufficient to support the verdict. In this connection, each of them argues that the circuit court of appeals applied an erroneous standard of appellate review in stating that its function was to determine whether the verdicts were supported by any substantial evidence. (No. 509, Pet. 3-9; No. 555, Pet. 17, 21, 54-63, 71-75.)

As we have shown, the question whether each petitioner knew that the money he was receiving from Perry had been obtained by misapplication of the bank's funds was submitted to the jury under instructions explicitly covering that issue. Each jury resolved that issue against each petitioner on, we submit, ample evidence.

It is undisputed that Randall and Hackbusch received at least \$16,000 and \$27,000, respectively,

over a period of years, by drawing checks on the National City Bank of Evansville, although they knew they did not have sufficient funds to cover those checks. They knew that their checks were not being cleared in regular fashion, since they never received regular statements for those checks. It is undisputed that they knew that Perry was covering the checks and that they expected him to do so. The jury had a right to conclude that petitioners knew that checks totaling large sums, which were continuously being cleared through the bank through the cooperation of Perry, the cashier of the bank, were cleared with the bank's money. The jury had a right to infer that businessmen know that they do not obtain personal loans from the cashier of a bank by drawing checks on the bank itself.

It was, of course, unimportant that Perry may not in so many words have told petitioners that he was using the bank's funds. Petitioners' practice of drawing checks on the bank for whatever expenses they had, regardless of whether or not they had funds in the bank, justified the inference that they had an understanding with Perry that he would see to it that their checks managed to clear the bank, and would use the bank's funds for that purpose. The evidence was therefore sufficient to support the conclusion that they conspired with Perry in misapplying the bank's funds. See *Ray v. United States*, 114 F. 2d 508 (C. C. A. 8), certiorari denied, 311 U. S. 709.

The judge properly instructed the jury that it was immaterial whether petitioners did or did not know the exact method by which Perry arranged to clear the checks. As this Court said in *Russell v. Post*, 138 U. S. 425, 431, a guilty person cannot "avoid his liability by proof that the exact nature and full details of the scheme were not communicated to him."

Petitioners' attack on the standard of appellate review applied by the court below is without merit. The standard set forth in the opinion below is the standard laid down in numerous decisions of this Court. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser v. United States*, 315 U. S. 60, 80; *Gorin v. United States*, 312 U. S. 19, 32; *Pierce v. United States*, 252 U. S. 239, 251-252; *Stilson v. United States*, 250 U. S. 583, 588-589; *Abrams v. United States*, 250 U. S. 616, 619. The principle that an acquittal must be had if the circumstances are as consistent with innocence as with guilt is essentially a rule for the jury and not for the court. *Curley v. United States*, 160 F. 2d 229 (App. D. C.), certiorari denied, 331 U. S. 837. In any event, by any standard of the sufficiency of the evidence, the evidence here is sufficient.

2. Petitioners also contend that, under Section 120 of the Judicial Code, District Judge Lindley was not qualified to sit as a member of the circuit court of appeals because he had sentenced Perry on Perry's plea of guilty to an indictment charg-

ing substantive violations of the Banking Act (No. 555, Pet. 21-22, 24, 66-70; No. 509, Supplemental Petition). There is no merit in this contention. Judge Lindley did not act in the district court on any question concerning petitioners' guilt. Perry's defalcations were not disputed in either case and were not in issue on petitioners' appeals.

3. In the Hackbusch case, No. 555, the judge gave his instructions to the jury at 7:30 p. m. on January 14, 1947 (R. 124.) At 9:45 the next morning,¹ the foreman stated that the jury had been unable to arrive at a verdict (R. 139). The following discussion ensued (R. 139-141):

The COURT. Is the jury being troubled by a question of fact or law?

The FOREMAN. I think not. It has all been discussed for many hours.

The COURT. Are there any questions of the law or any question of the instructions of the Court that you can not understand?

The FOREMAN. I think there might have been a little doubt about the instructions, interpretation of conspiracy, possible a definition of it.

The COURT. Well, I think I covered that so fully that I doubt if I could make it any more clear, if I would attempt to.

I would assume from what you said it is largely a question of fact, isn't it?

¹ The United States Attorney stated in his brief in the court below that the jury did not deliberate all night but retired to their hotel rooms about midnight.

The FOREMAN. I don't quite know how to express it, but there is doubt in some of the minds on whether conspiracy was perpetrated.

The COURT. Well, it is a question of fact that the jury has to determine. That is exactly the question.

Now, I want to say this to you men: You took this case last night, when you were tired and when I was tired, and you went to work after dinner, when you were still tired, I know, and worked faithfully no doubt during the evening, trying to arrive at some conclusion.

This case must be determined some time by somebody, and it is the duty of the jury to determine the case, if it is possible at all. If there were three judges, the three judges would have to get together on a judgment. Twelve jurors have always determined criminal cases and civil cases by getting together on a consensus of opinion that all could endorse.

No man, of course, should give up any conscientious conviction on a question of fact, but it is the duty of each juror to discuss earnestly with the other jurors every question that is involved, and to strive to get together in agreement upon some solution that all of you can endorse. That is the way jury verdicts are arrived at, and it is very important that no man should make up his mind to just simply sit back and say, "This is the way I feel about it—take it or leave it." •

You must discuss with one another. You must review the evidence over and over again, if necessary, go through it, consider it, and reach a unanimous conclusion, if possible.

I say, I don't ask you and don't suggest even, that you give up a conscientious scruple or conviction, but I do ask you to strive earnestly to reach a verdict, one that you can all say, "This is my verdict."

Now, I want you to go back to the jury room, and go through the evidence again, and if necessary a second time—go through it and keep working.

I sometimes work for days, trying to reach a solution of a case. I don't quit working. The jury must work, and you just can't guess a case off. You have got to work at it, review and review, try to get together. That is the purpose and the duty of the jury and if the juries will not get together, the courts are stale-mated, they can't make any progress.

Any suggestions by any of the counsel.

(No suggestions were offered by counsel.)

The COURT. Then you may return to the jury room. If you reach a point where you feel you must have some clarification of the law, I would suggest that you put it down in writing; then ask the bailiff to bring you back into the court, and I will try to clarify any point that may be bothering you, as a matter of law. I can't help you on the facts. That is something you have to take care of yourselves.

At about 11:00 a. m., the jury asked for further instructions on conspiracy and the judge repeated his instructions (R. 141-146). At 1:45 p. m., the jury returned its verdict of guilty.

There is no merit in petitioner's contention that the judge's remarks constituted coercion of the jury (Pet. 20-21, 24, 63-67). It is well established that a trial judge in his discretion may urge a jury which has reported disagreement to deliberate further in an endeavor to reach a verdict. *Allen v. United States*, 164 U. S. 492, 501-502; *Boehm v. United States*, 123 F. 2d 791, 812 (C. C. A. 8), certiorari denied, 315 U. S. 828; *United States v. Novick*, 124 F. 2d 107, 110 (C. C. A. 2), certiorari denied, 315 U. S. 813.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

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FEBRUARY 1948.

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U.S. - Supreme Court

FILED

MAR 29 1947

CHARLES ELLIOTT CO.

No. 509

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA
(October Term 1947)

HARRY R. RANDALL, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

MOTION FOR REHEARING ON APPLICATION
FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS
FOR THE 7TH CIRCUIT

MARVIN B. SIMPSON, SR.
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Attorneys for Petitioner



No. 509

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA
(October Term 1947)

HARRY R. RANDALL, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

MOTION FOR REHEARING ON PETITIONER'S
APPLICATION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE, and THE
HONORABLE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Petitioner Harry R. Randall files this his motion
for Rehearing in the above styled and numbered cause,
and as reasons therefor Petitioner says:

I.

This Honorable Court committed error in this case
in failing and refusing to grant petitioner a writ of
certiorari to the Circuit Court of Appeals for the
Seventh Circuit, because the evidence had on the trial
of this cause before the District Court, was insuffi-
cient to support the verdict of the jury, and the Cir-

cuit Court of Appeals committed error in affirming the trial court.

II.

This Honorable Court committed error in this cause in failing and refusing to grant petitioner's application for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, to correct the error of the trial court in refusing petitioner's motion for an instructed verdict because the evidence failed to show that the petitioner Randall had any knowledge or participated in any conspiracy with Perry, or any other person or persons, or had any agreement with said Perry or any other person, express or implied, to violate any law as charged in the indictment.

III.

This Honorable Court committed error in this cause by denying the petitioner's application, because the Circuit Court of Appeals applied the wrong rule of law to the facts in this case, in that the substantial evidence adduced on the trial did not exclude every other reasonable hypothesis except the guilt of petitioner Randall; It was the duty of the trial court to instruct the jury to return a verdict of not guilty and in failing so to do, it became the duty of the appellate court to reverse a judgment of conviction, which the appellate court failed to do.

IV.

This Honorable Court committed error in allowing the Circuit Court of Appeal's decision to stand un-

challenged after the Circuit Court had applied a wrong rule of law to the facts.

V.

This Honorable Court committed error in this case by refusing and failing to grant petitioner's application for a writ of certiorari, because District Judge Walter J. Lindley, had participated in such petitioner's appeal before the Circuit Court of Appeals, after having theretofore decided the same question involved in the trial court, in a case involving Sterling J. Perry.

VI.

The Honorable Court committed error in denying the petitioner's application for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, because the said circuit court as constituted with District Judge Lindley sitting was an unauthorized court, in that: District Judge Lindley had therefore decided the identical question involved in the appeal, and was thereby disqualified.

VII.

The Honorable Court committed error in denying the petitioner's application for a writ of certiorari because it is apparent from the record in this case that District Judge Lindley was disqualified from sitting in judgment on appeal in this case because he had the matter of the defendant Perry guilt or innocence before in a report of the Probation Office for that district, as well as the plea of not guilty in the Randall Case.

CONCLUSION AND PRAYER

For the foregoing reasons as well as the reasons heretofore urged and set forth by petitioner, the petitioner by his solicitor, respectfully prays that this Honorable Court grant him a rehearing in this cause, and that upon such rehearing a writ of certiorari issue to the Circuit Court of Appeals, for the Seventh Circuit, to the end that this cause may be reviewed and determined by this Court and that the judgment of the Circuit Court of Appeals be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Mack Taylor, Solicitor for the petitioner Harry R. Randall, do hereby certify that this motion for rehearing is filed in good faith and not for delay and is limited to matters set forth therein.

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